

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-4157

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATURAL RESOURCES DEFENSE COUNCIL, INC.,)

Petitioner,)

v.)

No. 77-4157

UNITED STATES NUCLEAR REGULATORY
COMMISSION and UNITED STATES OF
AMERICA,)

Respondents,)

POWER AUTHORITY OF THE STATE OF NEW
YORK, et al., AMERICAN ELECTRIC POWER
COMPANY, et al., BOSTON EDISON COMPANY,
et al., PENNSYLVANIA POWER & LIGHT
COMPANY,)

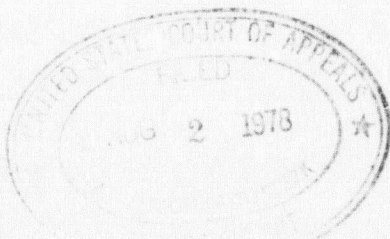
Intervenors.)

Petition for Review of an
Order of the Nuclear Regulatory Commission

PETITION FOR REHEARING

AND FOR

REHEARING IN BANC



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PETITION FOR REHEARING
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REHEARING IN BANC

Petitioner Natural Resources Defense Council
hereby petitions the Court for a rehearing, and alternatively
a rehearing in banc, of the decision entered on July 5, 1978.
The grounds for such petition are that, in the opinion of
petitioner, the Court's decision (1) fails to construe, and

conflicts with, the requirement of Section 103(d) of the Atomic Energy Act of 1954, 42 U.S.C. § 2133(d), and other relevant provisions of the statute; (2) violates governing rules of statutory construction; (3) violates basic principles of administrative law that an agency's findings must be public and express; (4) misconstrues the relief sought by the petition for review; and (5) jeopardizes the interest of petitioner and the public in securing a reasoned, systematic resolution to the waste disposal problem. The grounds for rehearing are more particularly described in the accompanying brief.

Petitioner also seeks a rehearing in banc because (1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, and (2) the proceeding involves questions of exceptional importance. 1/

1/ A rehearing in banc is sought despite our understanding that many of the judges in this Circuit disqualified themselves from hearing this matter earlier. We respectfully request that the judges reconsider this determination, in order that petitioner will not automatically be deprived of even the opportunity for this Court's consideration of rehearing this matter in banc. To the extent that the prior disqualifications were based on an assumed conflict of interest resulting from holdings of utility securities, petitioner submits that the issues in this case are far more important than individual economic interests, and we are satisfied that such security holdings or similar interests would not affect this Court's independent judgment on the issues herein.

Respectfully submitted,

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BY



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BRIEF IN SUPPORT OF PETITION FOR
REHEARING AND FOR REHEARING IN BANC

Twenty-four years ago, Congress authorized the commercial development of nuclear power, but only under a pervasive regulatory system which requires the Nuclear Regulatory Commission to determine that it is safe to issue reactor operating licenses. The single most serious safety issue to remain unresolved in the development of nuclear power to date is the disposal of the radioactive wastes from reactors. These waste products are lethal for 250,000 years. There is no known feasible way to dispose of them. The best that can be proposed with today's knowledge is long term storage -- storage longer than recorded history. And the scientific world is divided on whether storage anywhere or under any conditions is safe. This is a health and safety question of unsurpassed importance requiring the most probing and incisive scientific analysis.

The NRC has never considered the feasibility of long term storage of wastes in its safety review in licensing reactors. It arbitrarily considers only the safety of short term, interim storage of wastes at the power reactor site. What the NRC has done here, by analogy, is to consider the safety impact of firing a bullet in a rifle

but only up to the point it leaves the barrel. What happens after it leaves the barrel is arbitrarily excluded from the equation. Thus, the most important long term safety issue is excised from consideration. It is this Orwellian non-think which allows the NRC to "assume" that when the problem becomes critical, a solution will be at hand.

But the governing statute says that the NRC must consider "health and safety." Petitioner relies upon Section 103(d) of the Atomic Energy Act of 1954, 42 U.S.C. § 2133(d), which states that the NRC cannot issue a license for a power reactor if the licensing "would be inimical to ... the health and safety of the public." It petitioned the NRC for a hearing and a moratorium on new licensing pending the hearing, but withdrew the petition for an interim moratorium on appeal to this Court.

The NRC denied the petition for a hearing on the ground that its own legal interpretation of the statutory requirement to protect "the health and safety of the public" allowed it to ignore what happens to the nuclear waste products beyond the interim storage period at the reactor site. To be sure, the NRC offered its optimism that a solution would be forthcoming, and asserted that this optimism was an "implicit finding" in reactor licensing. Its pronouncement was made without a hearing or any other kind of formal proceeding and did not consider any of the evidence submitted in support of the petition. The upshot of the NRC decision is that petitioner

was denied a hearing and the requested statutory determination, based upon the NRC's interpretation of public health and safety which excludes the most serious safety issue of all.

Petitioner appealed. On July 5, 1978, the Court denied petitioner's claim. The decision makes five errors, any one of which requires a rehearing.

1. The Decision Never Reached the Question of What "Health and Safety" Means Under the Atomic Energy Act.

This Court's decision appears to hold that the NRC may discharge its safety review function without ever addressing the question of whether radioactive waste can be stored safely off the reactor site. Slip Op. 9. If so, the NRC could continue to license the reactors that generate the wastes even if there was unanimous scientific opinion that safe permanent storage of those wastes was impossible.

It is preposterous to assume that Congress could have intended this result. The Court thus never deals with the basic issue in this case: how exclusion of the most important nuclear safety issue could be reconciled with the statutory requirement that the NRC determine whether the licensing of reactors "would be inimical to the health and safety of the public." In fact, not a single sentence in the opinion has been devoted to any explanation of how the result satisfies the pervasive safety concerns evident in the Atomic Energy Act (Pet. Br. 33-36).

Rather, the Court accepts the NRC's administrative practice without further construction of the statute. It thus ignores this Court's prior admonition that "upon the courts rests the ultimate responsibility of declaring what a statute means." Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 790 (2d. Cir.), aff'd, 328 U.S. 275 (1946). As noted below, the Supreme Court has recently emphasized that a case must be decided on the basis of the statutory language when the strong and clear language of the statute is supposedly contravened only by tacit legislative approval of an administrative construction, as the NRC alleges. Tennessee Valley Authority v. Hill, 46 U.S.L.W. 4673, 4681 (June 15, 1978).

The Court in this case asserts that any doubt about Congress' intent was resolved by the passage of the Energy Reorganization Act, 42 U.S.C. §§ 5801 et seq., which, inter alia, granted the NRC additional licensing authority, over the ultimate waste storage facilities. There is, however, no guarantee (and substantial scientific doubt) that any such facilities will ever be built or proven adequate to protect public safety. The Court's opinion never considers, from this standpoint, whether Congress intended to deprive the NRC of authority to consider the feasibility of waste disposal in licensing the reactors which generate that waste in the first place.

2. The Opinion Clearly Violates Governing Rules of Statutory Construction.

The most striking thing about this Court's opinion is that none of the typical "materials" of statutory construction are used. The decision does not rely upon or interpret the language of any provision in the relevant statutes (apart from the single reference to the Energy Reorganization Act, discussed supra). It contains no analysis of how the pervasive safety purposes of the Act can be satisfied by the result reached here. Nor does it find any support for its decision in the legislative history of the Atomic Energy Act, as passed in 1954. The Court is unable to point to any subsequent express enactment or statement by Congress to support any supposed exemption from the safety finding requirement of the sort it countenances. No bill to this effect was ever introduced, much less voted upon; no House, Senate or conference report ever suggested that such an exception exists; and no member of Congress was ever recorded making any such claim in any hearing or debate. Indeed, there is no showing that Congress was even aware of the specific practice at issue in this case: that the NRC had dispensed with a written, express determination of the feasibility of safe, permanent waste storage in licensing the reactors which generate that waste.

This Court's decision thus violates the clear prescriptions in cases of the Supreme Court and this Circuit, against assuming Congressional acquiescence in an agency scheme without, at the very least, strong indications of Congressional knowledge of the practice. Pet. Br. 43-48; Reply Br. 20-28. In Tennessee Valley Authority v. Hill, 46 U.S.L.W. 4673 (June 15, 1978), the Supreme Court recently declined to find tacit Congressional approval of an exemption from the Endangered Species Act, although the evidence of Congressional knowledge and approval of the exemption was much stronger than in the instant case. The Court held that "repeals by implication are not favored," but must be "clear and manifest," and only a "clear repugnancy" between the older provision and some more recent Congressional action will cause a repealer of the former. 46 U.S.L.W. at 4683.

Moreover, the Supreme Court flatly rejected one of the principal arguments made by the Court in the instant case. This Court noted that it is "incredible" that the NRC and its predecessors would "have been violating the AEA for almost 20 years with almost no criticism or statutory amendment by Congress" Slip Op. 13. In the TVA case, the Supreme Court relied upon SEC v. Sloan, 46 U.S.L.W. 4426 (May 15, 1978), which declined to presume general Congressional acquiescence in a 34 year old practice of the SEC, despite the fact that

the appropriate Senate committee had long expressed approval of the practice. 46 U.S.L.W. at 4683.

Finally, with all due respect, we are unable to determine the relevance or import of much of the Court's exposition of the legislative and administrative action subsequent to the passage of the Atomic Energy Act. For example, the Court notes pointedly that Congress did not delay or stop reactor licensing in passing the Energy Reorganization Act, "notwithstanding such testimony as that of Dr. C.V. Smith, supra,..." Slip Op. 21. However, the testimony of Dr. Smith referred to occurred in 1977, three years after the passage of the ERA. See Slip Op. 16, 17. The Court describes at length various policies and regulations adopted concerning fuel reprocessing (Slip Op. 18-20), which has never been at issue in this case. It asserts that a quoted statement in petitioner's brief was taken out of context, but the earlier testimony which the Court then quotes does not contradict or affect petitioner's contention. Slip Op. 17. Finally, statements made to Congress in other parts of the opinion simply have no bearing on the ultimate issue presented in this case. See Slip Op. 18.

3. The Decision Violates the Most Basic Principle of Administrative Law That an Agency's Findings Must Be Public and Express.

The Court appears to derive considerable comfort from the NRC's assertion that it makes an "implied finding" of reasonable confidence that safe disposal is achievable, in issuing reactor licenses. See Slip Op. 6, 7, 8, 9, 21. The Court, however, completely ignores the well-established requirement that the NRC make explicit findings on all issues material to its ultimate conclusion that the licensing of a nuclear reactor will adequately protect the public health and safety. Brooks v. AEC, 476 F.2d 924 (D.C. Cir. 1973). See also International Union v. Marshall, ___ F.2d ___ (D.C. Cir. No. 76-1554, decided June 8, 1978), Slip Op. 14-16. The NRC's own regulations require as much. 10 C.F.R. §§ 2.700 et seq. See Pet. Br. 30-32.

Clearly, reliance upon this kind of "implied finding" -- if it exists -- effectively deprives the public, the courts and the Congress of any meaningful review of the agency's performance in protecting public health and safety. It is surely a paradigm of why the courts have uniformly rejected "implied findings." See Pet. Br. 25-33. This Court's opinion does not even address these questions.

4. The Court Misconstrued the Relief Sought By the Petition.

The Court's opinion assumed that the petition sought a moratorium on reactor licensing until a waste disposal facility was in place or there was "an accepted and approved plan" for such a facility. Slip Op. 4. However, the petition requested no such thing. It requested only that the NRC grant a hearing or otherwise determine whether "reasonable assurance" exists that safe waste disposal can be accomplished as needed. Pet. Br. 20-22. We share the Court's view that the statute does not require "absolute or perfect assurances concerning the public health and safety" (Slip Op. 4),^{1/} but we do believe that it requires that the agency openly address this question in reactor licensing.

Petitioner submits that the evidence in support of its petition at least casts substantial doubt on whether there is "reasonable assurance" of safe waste disposal. The relief requested in this Court is only that the NRC be required to consider this evidence, that its expertise be applied in declaring what would constitute the required

^{1/} As emphasized in petitioner's brief, this "reasonable assurance" could be based on a definitive finding "(1) that the technology exists for safe permanent disposal, although it need not be in place now, (2) that the appropriate technology will be fully implemented, and (3) that reactor licenses are conditioned on the establishment of and compliance with appropriate deadlines for the development of safe waste disposal facilities." Pet. Br. 21 (emphasis added).

reasonable assurance of safety, and that it decide whether this reasonable assurance in fact exists. If the NRC accepted petitioner's contentions in such an inquiry, the "health and safety" mandate of the statute would require a moratorium on reactor licensing. If it disagreed, reactor licensing would continue. In either event, the NRC's standards of "reasonable assurance" and their application to the evidence would be available for public, judicial and Congressional scrutiny.

This Court's opinion, without any analysis of this evidence, merely accepted the NRC's decision as warranted on the record and not arbitrary and capricious. Slip Op. 14, 23. The NRC decision thus approved, included a two page description of some governmental efforts to find a solution to the waste disposal problem, but entirely ignored the extensive evidence presented by petitioner. The NRC and this Court have therefore denied petitioner a hearing on this question without ever considering the evidence that it had presented which would have justified the review of this question.

To support this result, the Court relies upon the recent decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., ___ U.S. ___, 98 S. Ct. 1197 (1978). However, in Vermont Yankee, the Supreme Court emphasized its concern that radioactive waste disposal be considered in the environmental impact analysis

in reactor licensing, and remanded the case to the Court of Appeals to consider whether the NRC's record supported this environmental impact analysis of radioactive waste disposal. 98 S.Ct. 1209, 1214. This Court never explains how its decision, which removes that question from the NRC's safety review under the Atomic Energy Act, is compatible with the Supreme Court's decision in that respect.

5. This Court's Decision Jeopardizes the Interest of Petitioner and the Public In Securing a Reasoned, Systematic Resolution to the Waste Disposal Problem.

Ultimately, the Court's decision appears to rest on the following syllogism: (1) there is no reasonable assurance of safe waste disposal; (2) if the NRC made that finding, no nuclear plant could be licensed; (3) that result would be unthinkable; and (4) therefore, the NRC should not make any finding.

The NRC, and not this Court, must address the first question, and we emphasize that the finding of "reasonable assurance" does not require that a waste disposal facility be in place, as the Court assumes. As it stands, the Court's reasoning allows the expert agency to avoid a formal, focused review of this technical safety question and puts the Court's stamp of approval on informal hidden judgments. It therefore sidesteps the traditional function of the courts "to establish a decisionmaking process which assures a reasoned decision that

can be held up to the scrutiny of the scientific community and the public." International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651-52 (D.C. Cir. 1973) (Bazelon, Jr., concurring).

It is, of course, Congress which must finally determine whether nuclear power development should proceed. As an initial matter, however, Congress has committed the questions of nuclear safety to the NRC. The technical feasibility of waste disposal is clearly a matter best addressed in the decisionmaking process of this expert agency. If Congress disagrees as a matter of policy with the agency's determination, it can overrule the agency, as the Court in Tennessee Valley Authority v. Hill emphasized. But, this Court's decision effectively deprives Congress and the public of the agency's expert judgment. Ironically, under the Court's reasoning, the matter is excluded from the NRC's safety review precisely because it may constitute the greatest threat to public safety.

Respectfully submitted,

ROGER BEERS
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(Natural Resources Defense
Council, Inc.)

DATED: August 1, 1978

BY


ROGER BEERS

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CERTIFICATE OF SERVICE

I hereby certify that true copies of a Petition
for Rehearing and for Rehearing In Banc were mailed this
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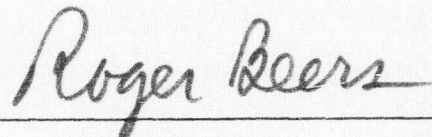
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